IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 555

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
HAROLD L. SMITH,
WRIGHT TISDALE,
Counsel for Appellant.

February 9, 1943.

INDEX

CASES CITED

STATUTORY PROVISIONS CITED

MISCELLANEOUS CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

COLUMBIA BROADCASTING SYSTEM, INC., *Appellant*, v. THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Respondents*.	No. 555

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT

The arguments in the brief for the United States and the Federal Communications Commission (herein called the "Government" Brief) have been so far anticipated in our main brief that no extensive reply is required.

We have sufficiently covered our contention that the subject of the kind of contractual terms which a network organization may make with its affiliated stations as consideration for furnishing them with a dependable supply of network programs is not within the rule-making power of the Commission granted by Section 303 of the Communications Act (Main Brief, pp. 20-39). The part of the Government's argument to which this reply is addressed is that relating to the licensing power of the Commission,

and the Commission's use of the principle of maximum competition as the controlling test in exercise of the licensing power.

THE NATURE OF THE REGULATIONS

The Government argues its case in persistent disregard of what these regulations actually provide. No question is here presented as to the extent to which competitive considerations may enter into the disposition by the Commission of a particular license application. Such expressions as that the Commission "may take into account" the preservation of competition in exercising its licensing authority (Br., p. 52), and equivalent expressions elsewhere in the brief are of no relevance. These regulations provide that *in no circumstances* can a license ever be granted or renewed to a station having an affiliation contract containing specified terms. What the Government must find, therefore, is authority in the statute to make that single fact the sole test of eligibility for a license, overriding all other considerations related to the interests of the listening public.*

*The same fallacy pervades the Government's argument on the other alleged principles upon which it says the Commission's action rested. For example it says (Br., p. 47) that the "principle of licensee responsibility" is a "relevant standard" under the statutory test; and (p. 46) that as far as it knows "it has never heretofore been questioned". But the point is that it has never heretofore been used in an attempt to justify any such regulations as those here involved. In fact, the Commission's Report uses it here only in connection with one of the regulations, 3.105, dealing with the grounds upon which a station may refuse to broadcast network programs. Nowhere in the parts of the Report dealing with competition is it mentioned.

The Government's argument (Br., p. 77, also p. 40) that the regulations are not "iron-bound", and that an applicant having a proscribed form of affiliation contract has still a chance despite the regulations to have his application granted, is an attempt to re-argue a question which was settled in the opinion of this Court on the former appeal. This Court there considered (316 U. S., p. 411, footnote) the passage in the Commission's Report relied upon as indicating that the regulations were mere expressions of "general policy", but concluded (316 U. S., pp. 417, 420):

> "The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. If the applicant for a license has entered into an affiliation contract, the regulations require the Commission to reject his application."
>
> * * *
>
> "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations."

When that fact appears, the Commission's action is to be automatic. That single fact compels denial of the license whether or not its existence has substantial, or any, effect on the station's service to listeners in the areas which it covers.

Manifestly, no authority to erect such a single controlling test is to be found in the licensing provisions, Sections 307, 308 and 309. Neither is it to be found in the administrative construction (Government Brief, pp. 68-71). In cases of the sort cited by the Government in its footnote to

page 69 the Commission is presented with an application proposing a change in the existing service in a particular case and locality, and decides, on a comparative basis, which of two alternatives, presented by the industry itself, will best serve the listening public. As the Commission stated in *Metropolis Company*, 6 F. C. C. 425, 428-429:

> "In all cases the controlling consideration (granting that the applicant is fully qualified) is the general public need for the radio service offered. In determining whether or not a general public need exists, no hard and fast rule may be followed as circumstances differ in one center of population from another, and manifold disparate elements must be determined in each case. The existence of need may only be determined from the record made in each proceeding."

Such administrative practice has no tendency to support the inflexible regulations here involved. The only administrative practice which does have a bearing is the Commission's renewal year after year of the licenses of Columbia's affiliates. Columbia has had formal affiliation contracts from the very start of its network operations in 1927 (Rep. p. 34, R. 90). From the beginning these have included provisions preventing the affiliates from making their stations available to programs of other networks. The provision enjoining Columbia from furnishing programs to stations other than its affiliates in the same cities dates from 1937 (*id.*, p. 35, R. 91). From the beginning in 1927 Columbia's affiliation contracts also have contained provisions giving Columbia an "option" on the time of the station, the variations being only with respect to the maximum amount of time optioned (*id.*, p. 37, R. 93). The present five-year term of the contract dates from 1936 (*id.*, p. 35, R. 91).

The Federal Communications Commission under the Act of 1934, and its predecessor the Federal Radio Commission under the Act of 1927, have long known of these provisions, and the practice of Columbia and its affiliated stations under them. The licenses of Columbia's affiliated stations have been presented for renewal to the Commission or its predecessor semi-annually until August 1, 1939, and thereafter annually, and have been successively renewed. These provisions of the affiliation contracts and the operations under them have never before been criticized by the Commission or its predecessor (Paley affid., R. 230; Complaint, par. Ninth, R. 9).

SECTION 311

Promulgation of general regulations providing any single controlling test of exercise of the licensing authority is the antithesis of application of the standard of "public convenience, interest or necessity". Authority to do so, therefore, must be found, if at all, in some section specifically prescribing the test. There are only two such provisions in the entire Act, and it is significant that neither refers to the standard. One is Section 310(a) expressly providing that a license shall not be "granted to or held by" alien interests as therein described. The other is Section 311 upon which the Government and the court below rely. Since these sections, in prescribing rigid tests, are exceptions to the flexible standard under which the Commission's general licensing function is exercised, they must be strictly construed.

The reasons why Section 311 cannot be construed to provide the authority required to sustain these regulations

are sufficiently set forth in our Main Brief (pp. 56-68). The argument in the Government Brief rests wholly upon attempted implications from the differences between Section 13 of the 1927 Act and Section 311 of the 1934 Act. It argues (Br., p. 65) that the 1934 amendment did not intend to "alter the entire theory of the 1927 Act by reading competition out of the public-interest standard". The answer is that competition never was in the public-interest standard of the 1927 Act, in any such sense as providing a sole ground for denial of a license. Section 13 provided an exceptional test, to be applied only in the special case described, where there had been a prior adjudication of violation of the anti-trust laws. The additional discretion which was given to the Commission by the 1934 Act was simply to give it authority to conclude, even where there had been a prior adjudication of guilt, that this was not in itself a sufficient ground for denial of a license, if the public-interest standard were deemed satisfied. This view is in harmony with the extract from the Senate Committee report quoted in the footnote at page 64 of the Government Brief. But the prerequisite for any action under that section, prior adjudication, remained unchanged. Here the Commission is attempting to use the section as support for regulations mandatorily requiring denial of licenses where, not only has there been no adjudication, but even the Commission has made no finding, that the anti-trust laws have been infringed. (See our Main Brief, p. 57, footnote.)

The Government says (Br., p. 52) that "The appellants apparently do not question the Commission's conclusion that existing network practices *impair* competition" (italics supplied). This statement wholly misstates our position. The only ground upon which the affiliation contracts could

even be said to "restrain" competition is in the sense that "every agreement concerning trade, every regulation of trade, restrains" (Brandeis, *J.*, in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238). But as this Court said in that opinion "the legality of an agreement or regulation cannot be determined by so simple a test, as whether it *restrains* competition. * * * The true test of legality is whether the restraint is such as merely regulates and *perhaps thereby promotes* competition or whether it is such as may suppress or even destroy competition" (italics supplied). (See also *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360, 361.) Our contention is that the affiliation contracts in fact promote competition in the markets where networks compete *inter sese* and stations compete *inter sese* and that any "restraints" in what the Commission calls the third or network-station market are slight in their effect on the totality of competition in the industry as a whole. (See our Main Brief, p. 54.)

There is nothing in the colloquy between Senator Broussard and Senator Dill which the Government quotes (Br. pp. 56-59) to support an idea that Congress intended that the existence in a contract of a provision which the *Commission* thought in restraint (but not necessarily in unreasonable restraint) of trade was enough to require in and of itself a denial of the license. The statement of Senator Broussard and the te[illegible]am which he quoted show that the primary subject-matter of the colloquy was the special interference problem, which we showed in our Main Brief (pp. 28-34), was the occasion for the enactment of the predecessor of Section 303(i). The only thing in the colloquy which would even superficially aid the Government in its argument on competition generally is Senator Dill's

statement that, "As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, by giving the Commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience or necessity". Senator Dill must be considered to have been speaking in that sentence of the consideration which the Commission might give to competitive features generally in passing upon individual applications. To attribute to him, on the basis of such general discussion, an interpretation of the statute as intending that the Commission might make the existence of contractual provisions deemed by *it* to be in restraint of trade a single controlling ground for denial of licenses would be inconsistent with his explicit statements which are quoted at pages 64-65 and 67* of our Main Brief.

THE BEARING OF THE CASE OF *SECURITIES AND EXCHANGE COMMISSION* v. *CHENERY CORPORATION, ET AL.*

The Government (pp. 70-77, 40) cites this Court's decision in *Securities and Exchange Commission* v. *Chenery Corp.*, No. 254, October Term, 1942, decided February 1, 1943, to support the proposition that "it would expedite

*In its brief (footnote, pp. 59-60) the Government seeks to avoid the effect of the second above colloquy (our Main Brief, p. 67), that between Senators Dill and Pittman, by asserting that it has been torn from its context. This colloquy occurred during a lengthy discussion in the Senate (68 Cong. Rec., 69th Cong., 2d Sess. (1927), pp. 3025-3037) of the conference report on H. R. 9971. We submit that when read in the light of the entire discussion this colloquy indicates a full realization in the Senate that the Commission was not intended to have the power of determining whether or not there was a monopoly.

business and further the ends of justice for an administrative body to formulate in general terms the policies which it proposes thereafter to follow".

As to that proposition, everything depends upon the nature of the authority which the administrative body has over the subject-matter of the regulations, and what the regulations themselves provide. We submit that none of the Court's expressions in the *Chenery Corporation* case have any tendency to support what the Commission has attempted to do by general regulations here.

The question in the *Chenery Corporation* case was with respect to the power of the Securities and Exchange Commission, by attaching conditions to its approval of a proposed plan of reorganization, to establish a new policy not theretofore recognized by law or equity as to the purchases of securities by officers and directors. This Court's statement, upon which the appellees here must rely, that

> "Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which this order here was a particular application, the problem for our consideration would have been very different"

thus related to a particular problem of policy which, if within the Commission's competence at all, should be established by rule. In the *Chenery Corporation* case the Commission had power to pass on the terms of the reorganization plan. The question was whether the particular condition it sought to exact was within that authority. But here the Communications Act contained no provision that a contract of affiliation between a licensed station and a national network organization should not be valid unless the Commission should approve its terms as in the public interest.

There was therefore no foundation for the promulgation of rules defining the terms which would or would not be permitted.

The real bearing of the *Chenery Corporation* case on this one is its holding that the order could not be upheld because the report of the Securities and Exchange Commission showed that it was grounded upon erroneous reasons. This fully supports the proposition advanced in Point Fourth of our Main Brief (pp. 71-79). This Court said:

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.
>
> * * * * * * * * *
>
> "We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

The Government's sole answer to Point Fourth in our Main Brief is the mere assertion (Br., p. 68, footnote) that the Report does not show that the Commission proceeded upon the grounds which we contend it did. It refers to pages in the Report in which, as to the subject-matter of each regulation, the Commission says that a station "does not operate in the public interest" (or some equivalent language) if it does such and such things.

It is true that in each sentence referred to the Commission did use words appropriate to a finding which, if it stood alone, might have been deemed to have been authorized by the statute. So in the *Chenery Corporation* case, the Securities and Exchange Commission made a

generally phrased finding that the plan of reorganization was not "fair and equitable" or was "detrimental to the interests of investors". So also in *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, and the other authorities cited at pages 77-78 of our Main Brief, the Interstate Commerce Commission made in words a finding, in the language of the applicable statute, that the rates were "unreasonable". But in all of those cases this Court found that such conclusory expressions took their meaning from the reasons advanced in detail in the parts of the report where the commission explained the reasons which impelled it to reach those conclusions. Finding those grounds to be erroneous, it concluded that the commission had made no real determination of the questions committed to it under the Act, and its order accordingly could not be upheld.

Respectfully submitted,

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
HAROLD L. SMITH,
WRIGHT TISDALE,
Counsel for Appellant.

February 9, 1943.